

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	▲ COURT USE ONLY ▲
[Father], Father of [Student], Complainant, vs. JEFFERSON COUNTY SCHOOL DISTRICT R-1, Respondent.	
AGENCY DECISION	

On October 4, 2023, the Colorado Department of Education (“CDE”), Exceptional Student Services Unit, received a Due Process Complaint filed by [Father] (“Father”) on behalf of his minor son, [Student], alleging that the Jefferson County School District R-1 (“District”) violated the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, (“IDEA”), under its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act, 1 CCR 301-8, (“ECEA”) by failing to provide [Student] with a free appropriate public education (“FAPE”). On October 5, 2023, the due process complaint was forwarded to the Office of Administrative Courts (“OAC”) and assigned to Administrative Law Judge (“ALJ”) Timothy L. Nemechek.

On October 31, 2023, the District filed a Notice of Insufficiency, Motion to Dismiss, and Response to Due Process Complaint. On November 8, 2023, Judge Nemechek granted in part Respondent’s Motion to Dismiss, ordering claims premised on conduct occurring before October 4, 2021 dismissed with prejudice; the remainder of the Due Process Complainant was dismissed without prejudice, and Father was granted leave to file an amended complaint.¹

On November 15, 2023, Father filed a Revised Due Process Complaint again alleging that the District violated the IDEA and ECEA by failing to provide his son FAPE. Father seeks an Independent Educational Evaluation (“IEE”); compensatory education in the form of one-on-one instruction for 30 hours per week for the remainder of the 2023-2024 school year and through twelfth grade if deemed appropriate by the Individualized

¹ Judge Nemechek retired from the OAC shortly after this ruling and the case was assigned to the undersigned.

Education Program (“IEP”) team; a \$5,000.00 compensatory education fund to be used at Father’s discretion; assistive technology and books; IEP revisions; annual training for administration and all staff who work with [Student]; an order permitting [Student] to retake failed sixth grade courses and the failing grades removed from his transcript; \$3,500.00 in “expert assistance funds” to be used by Father at his discretion; an additional \$5,000.00 for emotional distress; \$5,000.00 to Father for private assessments and evaluations of [Student]’s needs; \$3,000.00 to Father for therapy and counseling for [Student]; and an educational voucher to pay for [Student]’s education elsewhere. The Revised Due Process Complaint was assigned case number EA 2023-0031.

On February 15, 2024, the District filed a Due Process Complaint which was forwarded to the OAC on February 20, 2024 and assigned case number 2024-0012. As background to case 2024-0012, in October of 2023, the District sought consent to evaluate [Student], which Father granted. The District evaluated [Student] and then held IEP meetings on January 26, and 31, 2024. The IEP team revised [Student]’s IEP, changing his educational placement to an “Affective Needs” center. However, because Father filed the Revised Due Process Complaint, the “stay put” provision of [Student]’s previous IEP educational placement was triggered and [Student] could not be moved to the Affective Needs center. Therefore, the District filed its Due Process Complaint seeking to enact the January 2024 IEP, and then on February 22, 2024 filed a Motion to Consolidate cases 2023-0031 and 2024-0012. The District also seeks an order holding that it met all procedural requirements of the IDEA with respect to the evaluation of [Student] and development of the 2024 IEP, and an order holding that the January 2024 IEP offers [Student] FAPE in the Least Restrictive Environment (“LRE”). Father opposed the Motion to Consolidate and sought dismissal of case 2024-0012. On February 29, 2024, the court granted the Motion to Consolidate, denied Father’s Motion to Dismiss, and scheduled the consolidated case to be heard on the dates previously scheduled in case 2023-0031, March 11 through 14, 2024.

The hearing was convened in accordance with 20 U.S.C. § 1415(f), and held by video and Google Meet in Denver, Colorado on March 11 through 14, 2024. Father represented himself *pro se*, and Robert P. Montgomery, Esq. of Semple, Farrington, Everall & Case, P.C., represented the District, along with Alyssa Burghardt, Esq., counsel for the District. [Assistant Director], Assistant Director of Special Education Services for the District served as the District’s advisory witness. At hearing, the ALJ admitted into evidence the following exhibits: Father’s exhibits B011, B021 (Exhibit B021 does not come in for the truth of the matters asserted but rather for its effect on Father); B026, E019, J144, and J061; and the District’s exhibits: 1 through 5, 8 through 14, 16 through 35, 37, 38, and 48.

ISSUES PRESENTED

1. Whether Father has met his burden of proof establishing that the District failed to provide [Student] FAPE and if so, what are the proper remedies.

2. Whether the District has met its burden of proof establishing that the January 2024 IEP offers [Student] FAPE in the LRE.
3. Whether the District met all IDEA procedural requirements with respect to the evaluation of [Student] and the development of the 2024 IEP.

FINDINGS OF FACT

[Student]

1. [Student] is a twelve year-old (date of birth [D.O.B.]) sixth grader at [School], a District charter school. He qualifies for special education pursuant to the IDEA and ECEA in the disability category of Serious Emotional Disability (“SED”). He was found eligible for special education services when he was in first grade. Exhibit 30.

2. [Student]’s teachers describe him as sweet, creative, funny, kind, caring, and empathetic to his peers. He is “twice gifted,” meaning that in addition to being identified as a disabled student, he is a gifted and talented student.

3. [Student]’s parents are divorced and share 50-50 custody, with [Student] alternating weeks living with each parent. The weeks [Student] lives with his mother, he attends [School] regularly. The weeks he lives with Father, he does not attend school at all.

4. When [Student] is at school, he spends more than half of each day outside of the classroom, because he is currently unable to self-regulate and refuses to remain in class. Most days he leaves class after only a few minutes to spend the day in his special education teacher’s office. This extensive absence from the classroom has occurred almost daily throughout the 2023-2024 school year to date.

5. In August of 2022, on the first day of school in the 2022-2023 school year, [Student] eloped out of school and into the street where he was intercepted by a teacher. He was upset and stated, “I don’t want to exist on this planet.” After this incident, [Student] was taken to a suicide evaluation center outside of the District where he was evaluated and eventually cleared to return to school.

September 2022 IEP and [Student]’s Progress

6. There was an IEP in place prior to the September 21, 2022 IEP discussed below. The prior IEP was in place while [Student] was in remote learning. This prior IEP was not the focus of the hearing, but the court finds as fact that it was properly developed and provided [Student] FAPE in the LRE in accordance with the IDEA.

7. On September 21, 2022, [Student]’s IEP team met for his annual IEP review. Exhibit 17.

8. [Case Manager] is [Student]’s special education teacher and case manager.

She has a Master's degree in reading and instruction, and teaching certificates in special education and general education for grades kindergarten through eighth.

9. [Case Manager] credibly testified that there were no needs that [Student] exhibited that were not identified in this IEP. Father's input included his comment to [Case Manager] that, "This document is expertly written, and very accurate to [Student]'s current self... Thank you very much for putting the obvious work into this." *Id.* at 11.

10. [Case Manager] credibly testified that the accommodations and modifications on this IEP were appropriate to meet [Student]'s needs at that time. Some of those accommodations included [Student] using a text-to-speech device, frequent checks for understanding, sitting near the teacher, and taking frequent breaks. Exhibit 17 at 16.

11. The IEP Service Delivery statement called for 420 minutes of special education instruction monthly in the general education classroom, as well as small pullout groups and one-on-one settings to address his IEP goals. [Student] would also receive direct intervention and support from a special education teacher. *Id.* at 19.

12. [Case Manager] credibly testified that the service delivery statement minutes were appropriate at that time to meet [Student]'s needs.

13. On December 7, 2022, the IEP was amended because it included a safety plan after [Student]'s suicide evaluation that called for adult supervision at all times and daily backpack checks. These provisions were removed because [Student]'s behavior had so improved they were no longer necessary. Exhibit 21.

14. The September 21, 2022 IEP contained three goals. [Student] made progress in all three, as follows:

Goal: Writing, "By the next IEP, [Student] will be able to increase his independence and accuracy in written expression. This will be demonstrated by appropriately completing the writing process from start to finish, including brainstorming, planning using a graphic organizer, writing with 25% or less adult guidance, including appropriate mechanics, conventions and structure aligned with classroom and activity expectations; editing using the following resources: teacher-based, peer-based, and technology-based resources as determined by the student." Exhibit 22 at 1.

11/30/2022: Progress made. "[Student] has a great understanding of story elements and knows how to develop a story with all the details included. [Student] prefers to orally retell his story than to handwrite or type. This allows him to produce more writing and lessen his frustration. Good work [Student]!" *Id.*

2/28/2023: Progress Made. “[Student] is making great progress toward this goal. [Student] is a very creative writer and has lots of things to say when the topic is something that interests him.” *Id.*

05/31/2023: Progress Made. “[Student] continues to be a creative writer. He just finished a unit on Mid Summers Night Dream. He participated in the reading of the play as a whole class and helped with set design and set directions.” *Id.*

09/11/23: “First data point since the summer break. [Student] is spending some time in the SPED room to reacclimate himself to school. He is slowly adjusting to the 6th grade.” Exhibit 22 at 2.

9/18/2023: Supplemental: Progress Made: “[Student] continues to make progress towards this writing goal. He is still reluctant to use pen and paper to write his ideas down and prefers to use his Chromebook to type.” Exhibit 22 at 2.

Goal 2: Other: “By [Student]’s next annual IEP review, he will increase safe and appropriate behavior during unstructured times like recess, driveline, and the passing period between each class.” *Id.* at 3.

11/30/2022: Progress Made. “[Student] is making progress toward this goal as compared to the beginning of the school year. He has improved in knowing when he is feeling overstimulated and dysregulated, and will self initiate a ‘break.’ [Student] has been transitioning through the hallways 4/6 times with ‘safe’ behavior (no fake punching or lunging at other students) on average throughout the week. [Student] clearly understands the expectations of the school building. He moves between class periods to each class directly and takes breaks when he is feeling dysregulated. [Student] is doing a great job of asking to leave the classroom when he feels like he needs a break. Great work [Student]!” *Id.*

2/28/2023: Progress Made. “[Student] is making excellent progress toward this goal. He is able to regulate his sensory needs through self-directed and teacher directed breaks throughout the day. [Student] has been transitioning through the hallways 5/6 times with ‘safe’ behavior (no fake punching or lunging at other students). [Student] will most often choose to self-select a break when he is feeling dysregulated in his classes...[Student] is making GREAT progress toward this goal!” *Id.* at 4.

05/31/2023: Goal Met. “[Student] has done an amazing job this school year. He has met this goal. He is independent at regulating himself when he is upset or overwhelmed. He continues to use his resources when he needs a break and is able to reenter the classroom. Great work [Student]!” *Id.*

9/18/2023: Supplemental: Goal Met. “[Student] has met this goal. He is independent at utilizing safe and appropriate behavior during unstructured times

like recess, driveline, and the passing period between each class. Great work [Student]!" *Id.*

Goal 3: Self-Determination. Area of Need: "Task readiness, completion, and clean-up (to transition to the next period). By the next IEP, [Student] will demonstrate the ability to get ready for, begin, complete, and clean up from his in-class assignment with a reduced amount of reminders from an adult. This task will include: 1. Having materials out and ready. 2. Begin the assignment when asked with less than 10 prompts. 3. Work completion – similar to grade-level peers. 4. Work is turned in in the teacher-requested place. 5. Ready to transition to the next assignment or class period. Exhibit 22 at 6.

11/30/2022: Progress made. "[Student] is making progress toward this goal. When [Student] feels regulated and his sensory needs are met, [Student] will participate in classroom activities with his general education peers...[Student]'s schedule change that occurred 10/11/22 to better accommodate his sensory needs has greatly impacted his progress toward this goal. [Student] is more regulated within each classroom and will take less breaks and participate in the classroom assignments more. Keep up the good work [Student]!" Exhibit 22 at 7.

02/28/2023: Progress Made. "[Student] is making great progress toward this goal! [Student] will participate in group work but still prefers to work alone...[Student] has been amazing at reentering school and getting back into routine. He settled into the school routine with ease taking his breaks as he needed. Great work [Student]!" *Id.*

05/31/2023: Progress Made. "[Student] has made great progress through the whole school year. These last few weeks have been difficult for him to self regulate and he has been taking more breaks than usual. Even though he has been more dysregulated [Student] has continued to advocate for his needs. Great work this year [Student]!" *Id.*

09/18/2023: Supplemental: Progress Made. "[Student] is making progress toward this goal. He is still building rapport in some general education spaces and using more breaks in some spaces than others...He still continues to need reminders of specific materials needed for each class. He will consistently take his Chromebook from class to class." *Id.*

15. Father testified that as the 2022-2023 school year progressed, [Student] went from not knowing how to be at school, to progressing, to being able to function, to then by the end of the year being a high-functioning child.

16. Father testified that in the 2022-2023 school year, the IEP supports that were being used were having a beneficial result with [Student] such that he was able to interact well socially.

17. The court finds as fact that the September 2022 IEP provided [Student] FAPE in the LRE in the 2022-2023 school year and in the beginning of the 2023-2024 school year, as evidenced by [Student]'s progress on his goals. This IEP is currently in place due to the stay put provision that was triggered by Father's filing of his due process complaint.

[Student]'s Reevaluation: Fall of 2023 through February 8, 2024

18. On October 24, 2023, the District requested consent to reevaluate [Student] in the areas of communicative status, academic performance, social emotional status, health, and motor abilities. Exhibit 29. The reevaluation was proposed due to a suspected educational identification of Autism Spectrum Disorder ("ASD"). [Student]'s parents consented and testing took place through the fall and winter of 2023 and 2024.

19. During one of the testing days, [Student] was initially content and polite. After about 40 minutes, his demeanor changed. He refused to continue and said, "do you know that you suck – yes I hate you." Exhibit 30. He became dysregulated, began to cry, and said, "I am not fit to be here today; I can barely keep myself from having a mental breakdown and this is repetitive and annoying." He then started banging his head on the wall and faking punching at the clinician. He also made suicidal comments at which time the clinician stopped the testing. *See Id.*

20. [Case Manager], [Student]'s special education teacher and case manager, performed and authored the academic assessment portion of the reevaluation and Evaluation Report respectively, which included the Kaufman Test of Educational Achievement – 3rd Edition ("KTEA-3"). The KTEA-3 evaluates reading, mathematics, written language, and oral language.

21. [Case Manager] noted that [Student] struggled with non-preferred activities while test-taking. She attempted to administer the KTEA-3 on five occasions and was only successful during two sessions. During the second attempted testing session, [Student] refused to participate, screaming "no" at [Case Manager]. During the fourth session, he again refused, became angry, and began throwing objects in the classroom. Finally, in the fifth and last session, [Student] became upset, refused to continue working, and when prompted to begin working screamed "I hate you" repeatedly to [Case Manager]. Exhibit 30.

22. [Case Manager] credibly testified and the court finds as fact that it was not necessary to administer additional tests because the KTEA-3 provided a thorough and sufficient overview of [Student]'s abilities in all academic areas.

23. [Occupational Therapist] is an Occupational Therapist with a doctoral degree in occupational therapy ("OT"). She has worked for 12 years as an occupational therapist and has been with the District for four years. [Occupational Therapist] performs three to six evaluations per week for District students.

24. [Occupational Therapist] evaluated [Student] in October and November of 2023. She authored the Motor Assessment portion of his February 8, 2024 Evaluation Report. See Exhibit 30 at 31, *et seq.*

25. [Occupational Therapist] credibly testified that she administered the “gold standard” of OT testing, the Beery Buktenica Developmental Test of Visual-Motor Integration (“Beery”), as well as other tests. The Beery is a standardized test that assesses handwriting, symbols, numbers, visual motor integration, and visual perception. An average score falls between 85 and 115. [Student] scored a 92. *Id.*

26. Father asked [Occupational Therapist] to administer the “BOT” test. [Occupational Therapist] chose not to because [Student] had not taken it in the past and therefore there would be no points of comparison. [Occupational Therapist] also explained that the BOT exactly overlaps the Beery, and therefore was unnecessary.

27. [Student] did not complete one portion of the OT testing. [Occupational Therapist] explained what happened as follows:

[Student] chose to save the writing task for last. He wrote his name on the paper when prompted and then began writing a sentence from dictation with support for spelling as needed. [Student] wrote the first two words without difficulty and then started forcibly slamming the pencil tip onto the table until the pencil broke. The OT ignored the behavior, handing [Student] another pencil and redirecting him to write the next word. He wrote ‘No’ in the middle of the page. The OT gave one more verbal cue to write the next work in the sentence and [Student] wrote ‘I won’t’ on the page. He then stated, ‘Don’t you know I am on the verge of a mental breakdown?’ At this point the OT prompted [Student] to take a break on the bean bag and [Case Manager] returned to the office to support. [Student] took a 10 minute break before transitioning to his elective class. The OT determined that sufficient data had been collected to evaluate [Student]’s motor abilities and did not attempt to engage him another writing activity. Exhibit 30 at 31.

28. In the above-described event, [Occupational Therapist] also chose not to administer the BOT because she had concerns about over-testing. [Student] had become so dysregulated that [Occupational Therapist] decided continued testing was not in his best interests.

29. [Occupational Therapist] credibly testified that there was no information that she needed in order to fully assess [Student] in her area of expertise that she did not obtain.

30. [Speech Language Pathologist], M.S., CCC-SLP, is a District speech language pathologist. She has a Bachelor’s degree and a Master’s degree in speech

language pathology (“SLP”) and holds a national certification in that area. She has worked as a speech language pathologist for eight years. [Speech Language Pathologist] performs about five SLP evaluations per week for the District.

31. [Speech Language Pathologist] evaluated [Student] in November of 2023. She authored the communication assessment portion of his February 8, 2024 Evaluation Report. [Speech Language Pathologist] chose assessments that specifically targeted the suspected ASD educational identification.

32. [Speech Language Pathologist] administered the Clinical Assessment of Pragmatics (“CAPs”) test. Exhibit 30 at 3. The CAPs measures a child’s ability to use and understand language. [Speech Language Pathologist] explained that students with ASD have deficits in pragmatic language, including deficits in understanding non-verbal communication and in picking up on social cues. The CAPs test showed that [Student]’s use and understanding of nonverbal communication was an area of strength.

33. [Speech Language Pathologist] administered the Child Interview of Social Functioning by Scott Bellini. This assessment showed that [Student] struggles with friendships and has emotional deficits including depression. However, [Student]’s results showed he did not exhibit one of the three main traits of ASD, which is having restrictive interests.

34. [Speech Language Pathologist] administered the Self-5 assessment which measures expressive output of language, including vocabulary and grammar. [Student]’s results showed he has above average receptive and expressive language skills, and that he demonstrated strength in this area.

35. [Speech Language Pathologist] administered the Colorado Communication Rating Scale (“CCRS”). The CCRS “uses formal and informal measures to indicate the presence and/or severity of a Speech/Language Impairment and its impact on educational performance. The rating scale is as follows: 1 = No impairment; 2 = Mild; 3 = Moderate, 4 = Severe.” Exhibit 30 at 17. [Student] scored the following on the CCRS:

<u>Area of Communication:</u>	Rating
Articulation	1
Receptive Language	1
Expressive Language	1
Pragmatic Language	3
Voice	1
Fluency	1. Exhibit 30 at 17, 18.

36. [Speech Language Pathologist] administered the Checklist for Autism Spectrum Disorder (“CASD”). Exhibit 30 at 7. She also performed the “ASD Structured Observations” portion of the evaluation. *Id.* at 10, *et seq.* Based on these tests, [Speech Language Pathologist] determined that [Student] has deficits in social awareness,

nonverbal communication, and friendships, but that his ability to use language was a strength.

37. During [Speech Language Pathologist]'s testing of [Student], he became very dysregulated. He told her he was not mentally fit; he banged his head on the wall; he tried to take the test booklet and put it in the microwave; he "fake punched" her; and he said he would rather go to therapy than be tested. Despite his dysregulation, [Speech Language Pathologist] was able to fully and sufficiently evaluate [Student] in her area of expertise and there was no information she needed that she did not obtain.

38. [School Psychologist], Psy.D, is a School Psychologist for the District. She has a B.A. in psychology, a master's degree in education, and a doctorate in psychology. This is [School Psychologist]'s second year in the District; she worked for 12 years in a similar position in the Adams 12 school district, and before that she was a special education teacher.

39. [School Psychologist] performs 30-40 special education evaluations per year. [School Psychologist] was in charge of performing and writing the "Social and Emotional Assessments" portion of the February 8, 2024 Evaluation Report. Exhibit 30 at 23.

40. [School Psychologist] first met with [Student] in [Case Manager]' office. As they talked, [Student] self-identified as having autism. [School Psychologist] observed:

When asked further about that, he shared that he and his dad both have Autism and that they are very similar. When he was asked what qualities and characteristics he has that are associated with his Autism, he stated the following things in his own words: he has random changing of behaviors, he struggles to communicate his feelings, he gets migraines when weather changes, he can do things normal people can't do and he is able to actively control his thinking. He also shared that 'the doctors don't know, but are pretty sure' about his Autism diagnosis. Exhibit 30 at 26.

41. [School Psychologist] reviewed the Kauffman Intelligence Test that [Student] took in second grade and noted that he is very bright. The evaluation showed a verbal composite score in the 98th percentile, which is in the "Very Superior" range, and an IQ composite score of 123, in the 94th percentile, or "Superior" range. [School Psychologist] explained that cognitive scores do not change over time absent a head injury or accident.

42. [School Psychologist] performed the Behavior Assessment System for Children, Third Edition ("BASC-3"), which is a scale of social/emotional functioning. It consists of a questionnaire completed by [Student]'s teachers and parents, and it provides a day-to-day overview of [Student]'s social and emotional functioning. Exhibit 30 at 27-29.

43. The BASC-3 identified depression as a concern for [Student]. Also, all raters were concerned with [Student]’s somatization; i.e., he is often sick. [School Psychologist] noted that the somatization was very significant this year. She also noted that [Student] had more social/emotional needs currently than in the past. However, she learned that he has strong adaptation skills, strong social skills, and is known for being kind. *Id.*

44. On December 5, 2023, [School Psychologist] administered the Social Responsiveness Scale, Second Edition (“SRS-2”). The SRS-2 identifies areas that are consistent with an educational identification of ASD; specifically social motivation and social communication.

45. Father wanted [School Psychologist] to administer additional tests, including the Vineland, the ABAS and the ADOS. [School Psychologist] credibly explained, and the court finds as fact, that the Vineland and ABAS measure adaptive skills, and based on the testing she did, adaptive skills were not an area of concern.

46. The ADOS is a tool to assess ASD. [School Psychologist] did not administer it because the assessments she used gave her the same information as the ADOS would. She credibly testified that there is no information missing due to the fact that she did not administer the ADOS to [Student]. The court agrees and finds as fact that [School Psychologist] administered appropriate and sufficient assessments for her areas of expertise in the reevaluation and Evaluation Report, and that the Vineland, ABAS, and ADOS were not necessary.

47. [School Psychologist] had to stop the reevaluation in December of 2023 because Father withdrew his consent. However, she believes, and the court agrees and finds as fact, that the testing she was able to complete provides an accurate assessment of [Student] in her areas of expertise.

48. The District stopped all reevaluation in the winter of 2024 because Father withdrew his consent. However, all IEP team members, except for Father, believe the reevaluation had been thorough and sufficient, and that the resulting Evaluation Report dated February 8, 2024 accurately reflects [Student]’s present status, strengths, and deficits. Exhibit 30. The court agrees and finds as fact that the February 8, 2024 Evaluation Report is thorough, sufficient, and accurate.

[Student]’s Functional Behavioral Assessment and Behavior Intervention Plan

49. On August 31, 2022, the District sent Father and [Student]’s mother a Prior Written Notice and Consent to perform a Functional Behavior Analysis (“FBA”). The District sought to determine whether [Student] needed a Behavior Intervention Plan (“BIP”). His parents consented, and on January 19, 2024, the District conducted the FBA. Exhibits 14 and 31 at 1.

50. [Behavioral Analyst] is a District Behavioral Analyst (“BA”). She has

Bachelor's degrees in Clinical Psychology and Special Education, Master's degrees in Applied Behavior Analysis ("ABA") and ASD, and a Colorado teachers license.

51. [Behavioral Analyst] began her career as an in-home therapist for people with ASD and then worked at a private school for people with ASD. She worked for seven years as a District special education teacher, and has worked for eight years as a District BA.

52. In December of 2023, [Behavioral Analyst] was asked to develop an FBA for [Student]. An FBA is an objective analysis of the functions of negative behaviors. [Behavioral Analyst] explained that every behavior has a purpose, and the FBA helps determine the purpose of the targeted negative behaviors so that a BIP can be developed. The BIP provides the student socially acceptable behaviors to get the same needs met, thereby decreasing or ending the negative behaviors.

53. [Student]'s FBA targeted his negative behaviors of elopement, refusal, use of profanity, negative self-talk, threats of self-harm, aggression, and physical self-harm, among others. Exhibit 31 at 1. Specifically, the FBA defined some of his target behaviors as the following:

"When given a demand to complete a task [[Student]] will fake death and roll on the floor or pretend to break his neck. [[Student]] will also make comments about wishing he was dead or killing himself when given a demand." Exhibit 16.

"[[Student]] will ask to go to the nurse when he wants to go home without symptoms. [[Student]] will cry and yell comments such as 'you suck, I am dying, I hate you, why not, or I'm sick I need to go home' when he is told he cannot go. Asking to go to the nurse usually occurs before 9:30 AM." *Id.*

"[[Student]] does not always take assignments or handouts when they are handed to him, if they are placed on his desk, he will use his arm and swipe them onto the floor. [[Student]] will throw his glasses, fidgets, pencils, and papers in the classroom or in the hallway." *Id.*

54. Once the FBA was complete, the team identified replacement behaviors that would serve the same function as the targeted, negative behaviors, but are socially appropriate and safe. These skills were incorporated into [Student]'s BIP.

55. For example, one tool in the BIP included giving [Student] a "safe space" tailored to him. The team believed if [Student] knew he had a space to "escape" to when he became dysregulated, he would go to the safe space instead of eloping. Thus, his targeted negative behavior of elopement would end and would be replaced with the socially acceptable behavior of going to the pre-defined and available safe space. The BIP also gave [Student] scheduled sensory breaks. The consistency of those breaks provided him with him built-in escapes.

56. [Student]’s BIP was incorporated into his next IEP meeting, which was held on January 26 and 31, 2024.

January 2024 IEP

57. On January 26, 2024, [Student]’s IEP team met to review the results of the reevaluation. [Student]’s parents both attended this meeting. As explained above, the team agreed that the reevaluation and subsequent Evaluation Report had been sufficiently comprehensive to appropriately identify [Student]’s special education and related service needs. No one, including Father, disagreed at the meeting. See Exhibit 32.

58. [Behavioral Analyst] attended the IEP meeting. She reviewed the FBA and BIP with the team. There were no questions, and the team agreed with the finalized version of the BIP.

59. The IEP team next determined [Student]’s eligibility for special education. Specifically, the team considered the educational identification categories of Serious Emotional Disability (“SED”) and ASD. SED is defined as, “A child with Serious Emotional Disability shall have emotional or social functioning which prevents the child from receiving reasonable benefit from general education.” Exhibit 32.

60. [School Psychologist] attended the January 26, 2024 IEP meeting. She presented her information and explained that the IDEA contains criteria for an educational identification of ASD that does not align with the clinical DSM criteria; therefore a student may have a clinical diagnosis of ASD but not meet the educational identification criteria.

61. [School Psychologist] believed, based on her education and experience, that the team had comprehensive data sufficient to make a decision that [Student]’s educational identification was SED. [School Psychologist] explained that the components of SED include difficulties building relationships with peers and adults, and reactive behaviors that do not match the severity of a given situation.

62. In order to be identified as SED, the IEP team was required to review a five-question checklist. [Student]’s emotional and/or social functioning had to meet one or more of the five criteria. Exhibit 32 at 1. [Student] met the following four out of five criteria:

1. “An inability to build or maintain interpersonal relationships, which significantly interfere with the child’s social development.”
2. “Inappropriate types of behavior or feelings under normal circumstances.”
3. “A general pervasive mood of unhappiness or depression.”
4. “A tendency to develop physical symptoms or fears associated with

personal or school problems.” Exhibit 30 at 1.

63. To determine if [Student] should have an educational identification of ASD, the team was required to review a checklist with three criteria. However, to be identified as eligible for special education under ASD, all three criteria had to be met. [Student] did not meet all three criteria. Exhibit 32 at 2.

64. The team concluded that [Student] met one of the three criteria: “The child displays significant difficulties or differences or both in interacting with or understanding people and events.” *Id.*

65. The first criterion in the checklist that [Student] did not meet falls heavily in [Speech Language Pathologist]’s area of expertise, which was:

A developmental disability significantly affecting the verbal and nonverbal social communication and social interaction, generally evidenced by the age of three...The child displays significant difficulties or differences which extend beyond speech and language to other aspects of social communication, both receptively and expressively. (Examples of qualifying characteristic include, but are not limited to: an absence of verbal language or, if verbal language is present, typical integrated use of eye contact and body language is lacking; and/or significant difficulty sharing, engaging in imaginative play and developing and maintaining friendships). Exhibit 32 at 2.

66. [Speech Language Pathologist] credibly testified that this criterion was not met and is an area of strength for [Student].

67. The other criterion he did not meet was: “The child seeks consistency in environmental events to the point of exhibiting significant rigidity in routines and displays marked distress over changes in the routine, and/or has a significantly persistent preoccupation with or attachment to objects or topics.” Exhibit 32 at 2, 3.

68. [School Psychologist] summarized that [Student] does not display the repetitive behaviors and does not have the language deficiencies required for an ASD identification.

69. [School Psychologist] credibly testified that [Student] does have some needs associated with ASD, such as difficulties with social interactions, and making and keeping friendships with peers. She credibly explained that the IEP team addressed these needs in the January 2024 IEP even though ASD was not the educational identification. The team also developed accommodations for all of his needs, including the ASD needs.

70. [Case Manager], as [Student]’s special education teacher and case manager, and as the person most responsible for monitoring [Student]’s progress on his

IEP goals, agreed with the SED category because she observed [Student]’s emotional and social functioning impeding his access to education.

71. After meeting to determine [Student]’s special education eligibility, the IEP team met a second time, on January 31, 2024, to develop a new IEP using the information from the reevaluation, the FBA, and the BIP. Exhibit 33.

72. The IEP team wrote goals for [Student] in accordance with his needs identified in the Evaluation Report and the FBA. Goal 1 was Communication:

By next annual review, [[Student]] will improve his overall social communication skills, scoring at least a 14/15 on the given rubric across a 10 week period. Exhibit 33 at 8.

73. Goal 2 was Social/Emotional Wellness:

By 1/26/25, [Student] will independently utilize appropriate coping skills (ask for a break, take deep breaths, use sensory tool, go on a walk with a trusted adult) in response to emotional distress or challenging situation (e.g. being presented with a non preferred tasks or a non preferred environment) with an average score of 3, as measured by teacher observation and self-report over a 2 week data collection period based on a 4 point rubric scale. *Id.* at 9.

74. Goal 3 was Writing:

By the next IEP, [Student] will be able to increase his independence and accuracy in written expressions. This will be demonstrated by appropriately completing the writing process from start to finish, including: Grammar, Spelling, capitalization, punctuation, and number of sentences. We will know that [Student] has mastered this goal when he receives a score of 15/20 in the following rubric for 3 consecutive assignments. *Id.* at 10.

75. Goal 4 was Self-Determination:

Area of need: In-class time, Task readiness, completion, and clean-up (to transition to the next period). By the next IEP [Student] will demonstrate the ability to increase in class time, have materials ready and accessible, begin in class assignment, ask for help, work completion, and self regulation. We will know that [Student] has mastered this goal when he receives a score of 18/24 using the following rubric in 80% of class periods for 2 consecutive attendance weeks. *Id.*

76. Significantly, the IEP team concluded that for FAPE to be provided to [Student] in the LRE, his placement in general education needed to be reduced from 80%

of the time to 40%-79% of the time. No one at the IEP team meeting disagreed with this recommendation, including Father.

77. [Case Manager] credibly testified that the increased special education minutes were necessary because [Student] was spending increasingly more time out of the classroom trying to self-regulate. She noted a change in [Student] this school year from the previous year in that he was unable to sustain the same length of time in the general education classroom. Moreover, [Student] missed significantly more school this year than last, and only attended school every other week.

78. [Case Manager] further credibly testified that the one-on-one time she and [Student] spend together increased this school year, and that the level of support she has been providing him is not typical at [School]. As explained above, he spends at least 50% of each day that he is at school outside the classroom, usually in [Case Manager's] office, because he becomes dysregulated and refuses to remain in the classroom.

79. With respect to [Student]'s suicidal ideation behavior, [Case Manager] credibly testified that the IEP team agreed that mental health supports were necessary for [Student] to access education. This need for additional mental health supports was another reason the team increased [Student]'s special education minutes.

80. In light of all the information in the reevaluation, Evaluation Report, FBA, and BIP, as well as the IEP team's observations of [Student]'s increased dysregulation and time outside of the classroom in the 2023-2024 school year, the team concluded that [Student]'s placement needed to be changed to an Affective Needs ("AN") program in order for him to access education and receive FAPE in the LRE. [School] does not have an AN program, and therefore [Student] would need to change school locations.

81. [School Psychologist] explained that an AN center is for students with significant behavioral or emotional concerns that are impacting their ability to access general education. The District's AN center is located in a neighborhood school. [School Psychologist] explained that changing [Student]'s placement to an AN center is necessary for him because he needs a more intense level of support that can only be provided in the AN center.

82. [Behavioral Analyst] works in the AN center. She explained it is like a regular classroom in a neighborhood school but houses additional resources and supports. There is a higher staff to student ratio: one adult for every five students. All of the AN center staff are learning specialists, which is what the District calls special education teachers. The AN center also has onsite speech language professionals, occupational therapists, mental health providers, and para-educators specially trained for AN students. [Behavioral Analyst], as a BA, would also be part of [Student]'s educational team at the AN center. She would help his team implement the BIP.

83. [Behavioral Analyst] agreed that [Student] needs the AN center placement to access education in the LRE. She credibly testified that the level of support and

resources he needs to learn the replacement behaviors in his BIP would be provided at the AN center. [Behavioral Analyst] explained that the amount of daily instruction and reinforcement to teach [Student] the socially acceptable replacement behaviors would be very difficult to provide without the support of the AN center.

84. [Behavioral Analyst] also explained that the AN center placement would not necessarily be permanent, but that the goal would be for [Student] to gain the skills he needed to be able to return to general education.

85. [School Psychologist] agreed with the LRE change to general education 40-79% of the time and with placement at the AN center. She credibly testified that within the District, this is the only place to provide [Student] FAPE in the LRE.

86. The January 2024 Service Delivery Statement provides [Student] 240 minutes monthly of direct mental health minutes and 30 minutes indirect mental health minutes. The minutes break down into a 30 minute weekly on-on-one meeting with a mental health provider as well as 30 minute weekly group sessions where [Student] would practice his skills with peers. The AN center is able to provide these mental health services in a manner that [School] cannot, due in part to the center's staff-to-student ratio and its on-premises special education staff including the mental health and other related service providers. Exhibit 33 at 16.

87. [Assistant Director] is the District's Assistant Director for Special Education. [Assistant Director] started at the District in 2005 as a special education teacher. Prior to that she worked in a day treatment center and prior to that as an in-home ABA therapist. She has two bachelors' degrees in early education and special education, and two masters' degrees, in special education and severe cognitive needs. She has a director of special education license, an early childhood teacher license and a special education teacher's license. She has an endorsement for gifted and talented education.

88. [Assistant Director] explained that the District would provide transportation for [Student] to attend the AN center. She also explained that the AN center uses a point system wherein the students move up through levels, gaining more privileges the higher the level they achieve. [Student]'s BIP would be incorporated into this point and level system.

89. [Assistant Director] explained that the District limits the number of students in the AN center to 12 in order to ensure that the staff can meet all of the students' needs. [Assistant Director] further explained that all the AN staff have advanced training including trauma-informed care and crisis response. All of the related services providers, such as occupational therapists, mental health providers, speech language pathologists, etc., are available at the AN center at a level they are not at [School]. The AN center's mental health providers have master's level degrees and licenses. The AN center also has a school counselor and a social emotional learning specialist ("SEL"). The SEL is a school psychologist or a social worker who supports the AN students. [School] does not have a school psychologist.

90. The January 2024 IEP is not currently being implemented because of the stay put provision that went into effect with Father's filing of this case. The stay-put provision mandates that [Student] be in general education class 80% of the time. The District filed its Due Process Complaint seeking an order that the January 2024 IEP provides [Student] FAPE in the LRE, and that it should be immediately implemented.

91. Father testified at hearing that he believed the District failed to provide FAPE to [Student]. The ALJ does not find that the evidence supports Father's concerns and allegations. The impetus for Father's filing of the State Complaint and the Amended Due Process Complaint appears to be interactions Father had with [School] principal, [Principal], and an interaction with the [School] Vice Principal.

92. Specifically, Father testified that in the first few days of the 2023-2024 school year, [Student] was coming home consistently frustrated with his tech class. At the end of August of 2023, Father ran into [Principal] in passing. Father testified that out of courtesy he mentioned [Student]'s struggle with tech class. Father testified that his perception of [Principal]'s response was that [Principal] was going to go to the District and ask about the conditions to modify the tech class curriculum for [Student]. Father testified that [Principal]'s response did not "sit well" with him. Father conducted research and concluded that the tech class issue was an IEP team issue, because it had to do with [Student]'s class avoidance. Father sent an email to [Principal] about his conclusions and also called him.

93. Father testified that a new vice principal called him back. The new vice principal told Father about an event at school that day in which [Student] had gone to the restroom and closed the door too hard damaging the drywall. It was determined that the event was accidental, and no discipline was administered to [Student]. Instead, "restorative action" would be implemented, such as possibly a letter of apology to the staff who would be repairing the drywall. Father testified that he asked the vice principal about whether she had discussed the issue with [Case Manager], and that the vice principal's response was, "I don't know, but we will move forward with the restorative action."

94. Father testified that he "stewed" over the vice-principal's response. Then [Principal] called and they spoke. Father testified that he again asked if the drywall incident had been a disability-based sensory response because of the heat that day. Father testified he did not like [Principal]'s response, and therefore immediately drafted an email, which was his attempt to involve the IEP team in the drywall incident. See Exhibit B021.

95. Father testified that he felt an escalation needed to occur. Father testified that he waited ten days for a response concerning punishment about the drywall incident. After ten days he reached out to [Case Manager] and asked if [Student] had received a punishment but did not hear back from her.

96. On September 18, 2023 an IEP team meeting was held remotely. Father

attended but held up a sign that he was attending under protest. He had sent between 19 and 30 pages of “IEP suggestions” to the IEP team prior to the IEP team meeting.² When he did not hear back from the team prior to the meeting about his comments, he requested written explanation concerning the team’s consideration of his suggestions. He did not receive written explanations, and on October 4, 2023, he filed his Due Process Complaint.

DISCUSSION

Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion “where it usually falls, upon the party seeking relief.” See also *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008) (stating that, “[t]he burden of proof...rests with the party claiming a deficiency in the school district’s efforts”). Father therefore bears the burden of proving by a preponderance of the evidence that the District failed to provide [Student] FAPE in violation of the IDEA. If he is successful, he must prove that the relief he seeks is appropriate. The District has the burden to prove that it met all IDEA requirements with respect to the reevaluation of [Student] and the development of the 2024 IEP, and that the January 2024 IEP offers [Student] FAPE in the LRE.

Discussion

The Requirement of a FAPE

The ultimate question in any IDEA case is whether the student in question received FAPE. Father has the burden to prove that the 2021 IEP and the September 2022 IEP did not provide FAPE, and the District has the burden to prove that the January 2024 proposed IEP does.

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that provides special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an IEP calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d). To satisfy FAPE’s requirement, the school district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County School District RE-1*, 580 U.S. ___; 137 S.Ct. 988 (2017).

The focus of the hearing was the September 2022 IEP and the January 2024 proposed IEP. While there was some testimony concerning the 2021 IEP, the majority of the information about that IEP comes from Father’s Amended Due Process Complaint and the parties’ written closing arguments. The court cannot make findings of fact or

² Father testified that he sent 19 pages of suggestions; other evidence in the record suggests it was closer to 30 pages.

conclusions of law based on allegations in a complaint or arguments in a closing argument. The court concludes that the testimony Father gave about the alleged deficiencies with the 2021 IEP did not meet his burden of proving that the 2021 IEP failed to provide [Student] FAPE in the LRE.

Concerning whether the September 2022 IEP provided [Student] FAPE, the appropriateness of a child's IEP is determined according to a twofold standard: (1) has the State complied with the procedures set forth in the IDEA; and (2) is the student's IEP reasonably calculated to enable the child to make progress that is appropriate in light of his circumstances. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207-25 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1001 (2017). Here, Father testified that as the 2022-2023 school year progressed, [Student] went from "not knowing how to be at school, to progressing, to being able to function, to then by the end of the year being a high-functioning child." Father testified that in the 2022-2023 school year, the IEP supports in place were having a beneficial result with [Student] such that he was able to interact well socially. Significantly, Father did not present any persuasive evidence or testimony concerning how the September 2022 IEP was either not properly developed or not properly implemented. Indeed, Father's testimony was that he was pleased with [Student]'s progress through the end of the 2022-2023 school year.

The District, on the other hand, presented persuasive evidence that the September 2022 IEP was properly developed and implemented. Progress monitoring records in evidence show that [Student] was making progress in all goals contained in the September 2022 IEP throughout the 2022-2023 school year and at the beginning of the 2023-2024 school year. [Student] did begin to have difficulties at the beginning of the 2023-2024 school year, but [Case Manager], as [Student]'s case manager and special education teacher, was very aware of his difficulties and convened an IEP meeting in September 2023 in order to address all of [Student]'s needs and revise the IEP to meet his needs if appropriate. Before the September 2023 IEP could be finalized, Father filed this case which, as already stated, invoked the stay put provision.

Father testified about other events he asserted were evidence of the District's failure to provide FAPE. The court fully considered all of Father's testimony and examined each assertion carefully and concludes that none of the issues he presented amount to a denial of FAPE. Father had the burden of proof, and the court concludes that Father has failed to meet his burden that the September 2022 IEP did not provide [Student] FAPE. All of the objective evidence in the record persuades the court that the September 2022 IEP was properly developed and implemented and provided [Student] FAPE in the LRE in accordance with *Rowley* and *Andrew F*, *supra*.

Next, the District has the burden to prove that the January 2024 IEP was properly developed, provides [Student] FAPE in the LRE, and should be immediately implemented. The court concludes that the District has met its burden. The court is persuaded by the overwhelming evidence in the record that the winter 2023-2024 reevaluation and subsequent February 2024 Evaluation Report was thorough,

appropriate, and sufficient. Every evaluator was an expert in her area of responsibility, all holding multiple advanced degrees and having years of experience. To a person, each evaluator was competent, thorough, and appeared to sincerely want to help [Student] access his education to the fullest extent possible. Each witness walked the court through every step of her evaluation of [Student], from how and why she chose which assessments she used, to the ultimate conclusions she made based on her advanced education and years of experience. These witnesses, to a person, were credible, articulate, and persuasive. The court concludes that the reevaluation contained appropriate and sufficient assessments and that an IEE at public expense is therefore not warranted.

While the reevaluation was being conducted, [Behavioral Analyst] was also performing an FBA. [Behavioral Analyst] likewise is an expert in her area and has advanced education and years of experience. She articulately explained to the court the purpose of an FBA, how it is developed, and how it is implemented in the BIP. She was able to make a complex concept easily understandable. In short, [Behavioral Analyst] was a credible and persuasive witness, who clearly understood the purposes of [Student]'s negative behaviors and wanted to help replace those behaviors so he could successfully access his education.

The District then appropriately used the Evaluation Report, the FBA, and the BIP to develop the January 2024 IEP. Significantly, the team as a whole, with the possible exception of Father³, believed [Student] needed more special education and a specific placement at an AN center due to his increasing inability to self-regulate and access his education. The overwhelming evidence in the record supports this conclusion. To date in this school year, when [Student] is at school, he is unable to remain in the classroom for more than a few minutes at a time before he dysregulates and refuses to remain in class. This extensive absence from the classroom has occurred daily throughout the 2023-2024 school year to date. The persuasive evidence in the record is that [School] does not have the level of special education and related services and supports that [Student] needs to access education; he needs the low staff-to-student ratio and all of the mental health and other service providers that are available at the AN center, that are not available at [School].

Furthermore, the court concludes that the District complied with all of the IDEA's procedural requirements concerning the development of the January 2024 IEP. Both parents, including Father, were given ample opportunity to participate in the IEP meeting and in the development of the IEP. The fact that the IEP team did not provide Father a written explanation of why it did not respond to his 19-to-30 pages of suggestions is not persuasive evidence of any procedural violations. No evidence was presented that persuades the court that any procedural violations existed, let alone impeded [Student]'s right to FAPE.

³ It is unclear to the court if Father specifically disagrees with the AN center placement. All of the District's witnesses who attended the January 2024 IEP meeting testified that Father did not express disagreement with the AN center placement. However, in pre-hearing motions to the court, Father sought a pre-hearing order from the undersigned unilaterally placing [Student] in homebound education.

Finally, based on the substantive evidence in the record, the court concludes that the January 2024 IEP met all procedural requirements; that the January 2024 IEP contains all elements required by the IDEA; that the January 2024 IEP is reasonably calculated to enable [Student] to make progress appropriate in light of his circumstances; and finally that the January 2024 IEP provides FAPE to [Student] in the LRE, in accordance with 34 C.F.R. § 300.513(a)(1), *Rowley* and *Andrew F, supra*. The District has met its burden of proof.

DECISION

For all of the reasons explained above, it is the decision of the ALJ to dismiss all of Father's claims and deny all of his requests for relief. It is ordered that the January 2024 IEP be immediately implemented. This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

DONE AND SIGNED: April 19, 2024

/s/ Tanya T. Light
TANYA T. LIGHT
Administrative Law Judge